



Date: February 1, 1999

Case No.: 1996-INA-0222

In the Matter of:

GLENDALE CALVARY PRESBYTERIAN CHURCH,
Employer

On Behalf Of:

MI SOON OH,
Alien

Certifying Officer: Rebecca Marsh Day, Region IX

Appearance: Thomas Bohrer, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 9, 1993, Glendale Calvary Presbyterian Church ("Employer") filed an application for labor certification to enable Mi Soon Oh ("Alien") to fill the position of Choir Director (AF 52-53).² The job duties for the position are, "[c]onducts the church choir auditions & selects choir members. Selects music and directs rehearsals & performances utilizing knowledge of conducting techniques & music theory. Schedules outside performances. Teaches church music classes." (AF 52).

The requirements for the position are eight years of grade school, four years of high school, an Associates Degree in Music, and two years of experience in the job offered. (AF 52). The work schedule for the position offered is 9 a.m. to 7 p.m. on Sunday, and 3 p.m. to 9 p.m. on Monday through Friday, totaling forty hours per week. (AF 52).

The CO issued a Notice of Findings on May 4, 1995 (AF 43-45), proposing to deny certification on the ground that it was "unclear whether the job opportunity constitutes full-time employment," thereby violating 20 C.F.R. § 656.3. Specifically, the CO noted that "[a]ccording to the Occupational Outlook Handbook, it is the usual working condition for 'musicians [to] find only part-time work or experience unemployment between engagements, they often supplement their income with other types of jobs.'" (AF 44). The CO further noted that the remarks of Employer's counsel regarding the work schedule for the job offered are "unsubstantiated assertions" and that the Board of Alien Labor Certification Appeals ("BALCA" or "Board") "generally does not consider the statements of an employer's attorney as evidence." (AF 44). The CO directed Employer to "convincingly document with specificity the detailed activities the worker will perform" during the scheduled work hours. (AF 44). Accordingly, Employer was notified that it had until June 8, 1995, to rebut the findings or to cure the defects noted. (AF 43).

In its rebuttal, dated May 17, 1995 (AF 33-42), Employer contends that the CO's proposed findings are based on legal and factual errors and are, therefore, invalid. First, Employer noted that much of the CO's argument was based on the entry for "Musicians" in the *Occupational Outlook Handbook*. (AF 33). Employer points out that the job offered is not that of musician but choir director. (AF 33). This difference is further underscored, argues Employer, by the fact that there are separate entries in the *Dictionary of Occupational Titles* for choral

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

² The Employer amended the offered wages on October 26, 1993 (AF 55).

director and musician. (AF 35). Employer contends that, in addition to being inapplicable to the job offered, the *Occupational Outlook Handbook* entry for musician has been misquoted and misread by the CO. (AF 34). According to Employer, that entry when properly read indicates that some, not the majority, musicians are not employed full-time. (AF 340). Thus, Employer argues, the CO has misread the passage about musicians and then misapplied it to the job of choir director. (AF 34).

Employer next takes issue with the CO's argument that the work schedule for the position is evidenced only by Employer's counsel's unsubstantiated and inadmissible argument. (AF 36). The work hours, Employer notes, are clearly indicated on the application. (AF 36). Furthermore, Employer argues, the application is properly considered evidence and has been sworn to by Employer. (AF 37). Employer concludes by stating that the CO's request for independent documentation of the hours to be worked is a request for something that cannot exist and must, under relevant case law, be judged based on the credibility of the witness so testifying. (AF 38). In summation, Employer writes that nothing in the Notice of Findings can serve as a basis for denial. (AF 38).

The CO issued the Final Determination on August 16, 1995 (AF 26-29), denying certification on the ground that Employer failed to document that the job offered constitutes full-time employment, thereby violating 20 C.F.R. § 656.3. While taking note of the rebuttal, the CO found it unconvincing. (AF 29).

On September 7, 1995, Counsel for the Employer requested reconsideration or review of the denial of labor certification (AF 2-25). The CO denied reconsideration on September 12, 1995 (AF 1), and forwarded the record to the Board in March 1996. Counsel for the Employer submitted a Brief on April 6, 1996.

Discussion

Employer argues that the CO's denial of labor certification in the case *sub judice* on the ground that Employer failed to document that the job offered constituted full-time employment is contrary to the evidence on record. We agree.

The CO's rationale for denying certification rests upon a passage of the *Occupational Outlook Handbook*, which the CO has interpreted to mean that it is expected that a musician will not find full-time employment. The CO has, hopefully inadvertently, misinterpreted the passage in question. In the Notice of Findings, the CO wrote that "[a]ccording to the Occupational Outlook Handbook, it is the usual working condition for 'musicians [to] find only part-time work or experience unemployment between engagements, they often supplement their income with other types of jobs.'" In full the quoted sentence reads as follows: "Because many musicians find only part-time work or experience unemployment between engagements, they often supplement their income with other types of jobs." In both its common meaning and in the quoted sentence, the word "many" does not necessitate or imply a majority. Thus, the CO has taken a single sentence out of its context, selectively quoted part of the sentence thereby changing its meaning, generalized that new meaning to a universal rule, applied the general "rule" for all musicians to the sub-category of choir directors, and then denied certification almost solely on that basis. The

link between the application before the CO and the rules by which that application was judged is so tenuous as to be non-existent. The CO's decision is irrational at its worst and arbitrary at its best. For the foregoing reasons the CO's denial of labor certification cannot be affirmed.

Despite the CO's statements to the contrary, there is abundant evidence in the Appeal File regarding the full-time nature of the job offered. The application, which was signed by Employer under penalty of perjury pursuant to 28 U.S.C. § 1746, lists a number of duties to be performed and clearly indicates a forty hour work week. The record is devoid of any evidence indicating that the job offered constitutes something less than full-time employment. Assuming *arguendo* that the Regulations permit the question of whether an otherwise proper job offer "fills" a forty hour work week, the record contains sufficient evidence upon which to decide this case. Because the preponderance of that evidence indicates that the job offered does constitute full-time employment, labor certification will be granted.

ORDER

This matter is hereby **Remanded** to the Certifying Officer, who is directed to **Grant** Labor Certification.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

***Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

